SUPREME COURT, U. S.
FILED
APR 17 1972
MICHAEL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1337

EDWARD DEVINE JOHNSON, *et al.*,

Petitioners,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

JOHN C. LOWE
American Civil Liberties
Union of Virginia
1111 West Main Street
Charlottesville, Virginia 22903

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010

Attorneys for Petitioners

F. GUTHRIE GORDON, III
LOWE & GORDON
1111 West Main Street
Charlottesville, Virginia 22903
Of Counsel

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statute Involved 2

Statement of the Case 3

How the Federal Questions Were Raised 7

REASONS FOR GRANTING THE WRIT

1. The Court should determine whether a general criminal trespass statute can constitutionally be applied to punish peaceful, non-disruptive assembly and protest in a public place where the participants have a right to be 7

2. This Court should resolve the decisional conflict as to whether a defendant who appeals his conviction from a state non-record court may receive a harsher sentence following a trial *de novo* in a court of record 9

CONCLUSION 12

APPENDIX

Decision of the Supreme Court of Virginia 1a

Madison College Regulations 12a

Table of Authorities

PAGE

Cases:

Adderly v. Florida, 385 U.S. 39 (1966) 8
Amalgamated Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968) 8

Brown v. Louisiana, 383 U.S. 131 (1966) 8

Colton v. Kentucky, No. 71-404 (Oct. Term 1971) 10

Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), *cert. denied*, 397 U.S. 1017 (1970) 10
Lusby v. Virginia, No. 71-525, *cert. denied*, 40 U.S. Law Week 3480 (1972) 7

North Carolina v. Pearce, 395 U.S. 711 (1969) 10, 11
North Carolina v. Rice, 40 U.S. Law Week 4073 (1971) (*per curiam*) 10

Sword v. Fox, 317 F. Supp. 1055 (W.D. Va. 1970), *rev'd* 446 F.2d 1091 (4th Cir.), *cert. denied*, —— U.S. ——, 30 L.Ed.2d 547 (1971) 3, 4, 5, 7, 9

Terry v. Superintendent of Field Unit No. 9, 454 F.2d 591 (4th Cir. 1972) 10
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 8

Unemployed Workers Union v. Hackett, 332 F. Supp. 1372 (D. R.I. 1971) 8

PAGE

Wolin v. Port of New York Authority, 393 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) 8

Wood v. Ross, 434 F.2d 297 (4th Cir. 1970), *app. sub nom.*, North Carolina v. Rice, 40 U.S. Law Week 4073 (1971) 10, 11

Constitutional Provision:

United States Constitution
First Amendment 7, 8, 9

Federal Statute:

28 U.S.C. §1257(3) 2

State Statutes:

Va. Code Ann. Section 16.1-136 (1960 Repl. vol.) 10

Va. Code Ann. Section 18.1-173 (1960 Repl. vol.) 2, 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

EDWARD DEVINE JOHNSON, *et al.*,

Petitioners,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Petitioners pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Virginia, entered on January 17, 1972, affirming the order of conviction and sentencing entered by the Circuit Court of Rockingham County, Virginia, on July 6, 1970.

Opinion Below

The opinion of the Supreme Court of Virginia is reported at 212 Va. 579 (1972), and is set forth in the Appendix, *infra,* at pp. 1a-11a.

Jurisdiction

The judgment of the Supreme Court of Virginia was entered on January 17, 1972. The jurisdiction of this court is invoked pursuant to 28 U.S.C. section 1257(3).

Questions Presented

1. Whether participants in a concededly peaceful, non-disruptive vigil, conducted in the lobby area of an open campus building, may be convicted of criminal trespass because of a college regulation prohibiting "demonstrations . . . inside any buildings . . . "?

2. Whether a criminal defendant who has been convicted and sentenced in a non-record court may receive a grossly harsher sentence following his appeal and trial *de novo* in a court of record?

Statute Involved

Virginia Code Section 18.1-173 provides in pertinent part as follows:

> Section 18.1-173. *Trespass after having been forbidden to do so.*—If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, . . . after having been forbidden to do so, . . . by the owner, lessee, custodian or other person lawfully in charge thereof, . . . he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by confinement in jail not ex-

ceeding twelve months, or by both such fine and imprisonment.

Statement of the Case

The essential facts are not in dispute. They were developed both in the criminal trials below and also in an ancillary federal action seeking injunctive and declaratory relief. *Sword* v. *Fox*, 317 F. Supp. 1055 (W.D. Va. 1970), *rev'd*, 446 F.2d 1091 (4th Cir.), *cert. denied*, —— U.S. ——, 30 L.Ed.2d 547 (1971) (Justices Douglas and Brennan dissenting). They are as follows.

The petitioners are six students and one faculty member at Madison College, a four-year, coeducational state college in Harrisonburg, Virginia. App., *infra*, p. 1a. In April 1970 a controversy developed on the campus concerning the college's decision not to retain certain teachers. 446 F.2d at 1093. On Friday, April 24, 1970 a number of students sought permission to conduct a vigil in Wilson Hall, 48 hours later on Sunday evening (T. 23, TT. 29).* Wilson Hall is a major campus building containing administration and faculty offices, classrooms and an auditorium. It was never locked. (T. 54-55; TT. 10-11). The students' intention was to maintain an overnight vigil in the lobby of Wilson Hall to dramatize their views and then speak with the college president in the morning. 446 F.2d at 1093-94; 317 F. Supp. at 1059.[1]

---

* "T. ——" refers to the transcript of the trial in the Rockingham County Court; "TT. ——" refers to the transcript of the trial *de novo* in the Circuit Court of Rockingham County.

[1] The students had attempted a similar vigil on Thursday night, April 23. Following a meeting and rally, held in conformity with college regulations, a group of 25 people proceeded to Wilson Hall

Dean Fox denied permission to hold the vigil on the ground that it would constitute a demonstration inside a building supposedly impermissible under college regulations (T. 5-6, 23-24; TT. 29, 43).[2]

Nevertheless, on Sunday evening, April 26, a group of approximately 50 students and faculty members again assembled in the lobby of Wilson Hall (T. 4-6, 31). School officials and local police arrived at approximately 9:00 P.M. and began locking the building (T. 31, 60, 89; TT. 12-13). At approximately 9:30 P.M. Dean Fox advised the group that they were violating college regulations and were trespassing (T. 7-9; TT. 32-33). He returned shortly after 10:00 P.M. and repeated his warning. Some of the students left, but approximately 25 remained. The Dean began taking their names, which they gave him voluntarily (T. 20-21). The Dean left to obtain arrest warrants for those individuals and returned with State police to have them arrested. Approximately 30 people, including these petitioners, were arrested that night.

There was some testimony that after the building had been locked, one or two of the people inside encouraged some students gathered outside the building to come in

---

and assembled there at approximately 11:00 P.M. 446 F.2d at 1093; 317 F. Supp. at 1059. They remained there over an hour, during which time "the passages were kept clear, and there was no boisterousness. Most sat and talked, a few had brought something to read". 317 F. Supp. at 1059. At 12:40 A.M. Dean Fox arrived, informed the group that they were conducting an unregistered demonstration and asked them to leave. Most of the group complied. The Dean returned a while later and the remaining persons also left.

The following morning, the students requested permission for their Sunday night vigil.

[2] Those regulations are set forth in the Appendix, *infra* at pp. 12a-15a.

(T. 79; TT. 15, 20). There was occasional cheering and some of the group inside sang songs. But the testimony of the college officials overwhelmingly demonstrates that the people were quiet and peaceful, cooperative and courteous (T. 14-15, 20-21, 90-91; TT. 22, 43-44). Indeed, the students even swept the floor before leaving. 317 F. Supp. at 1060.

The petitioners and others were charged with violating the state trespass law, *Va. Code Ann.* Section 18.1-173 (1960 repl. vol.).[3]

On May 7, 1970, they were tried in Rockingham County Court. The petitioners pleaded not guilty, maintained that their activity was constitutionally protected and argued that Section 18.1-173 was inapplicable to activity conducted on state owned property. They were found guilty. Before sentencing, County Court Judge Porter Graves, Prosecuting Attorney Jack F. DePoy and Defense Counsel John C. Lowe met to discuss the question of punishment. The parties agreed that in view of the finding of guilty by the court a punishment of a $100 fine with $50 suspended upon condition of good behavior was an appropriate disposition (TT. 116-17, 123-25). Sentences were meted out accordingly for all accused.

The petitioners here appealed to the Circuit Court of Rockingham County, solely to challenge the points of law in question. They waived their rights to a trial by jury in order to allow the Circuit Court judge to decide points of

---

[3] In addition to causing the arrests, college officials also took disciplinary action against the students involved. Several of the students brought suit to enjoin those proceedings and declare the campus regulations unconstitutional. District Judge Merhige agreed with the students and granted relief, but his decision was reversed by the Fourth Circuit, which held the regulations to be reasonable. *Sword* v. *Fox, supra.*

law without the complications of a jury. The Court, however, refused to concur in the waiver of trial by jury (TT. 1-2).

Jack F. DePoy prosecuted, as he had earlier at the trial in the court not of record. Petitioners argued only the legal issues, conceding the relevant facts but contending once again that their behavior was constitutionally protected and that the state trespass statute did not apply (TT. 65-77).[4] Petitioners offered no evidence.

Despite the fact that prosecuting attorney DePoy had concurred that the small fines imposed in the court not of record were appropriate in the case when it was heard there, in his summation to the jury in the court of record, he argued that the trespass was "a very serious criminal offense" and should be dealt with appropriately (TT. 93).

The jury found petitioners guilty and imposed much harsher sentences than had been given below, to wit: James McClung, nine months in jail and $1,000 fine, Jay Garland Rainey, six months in jail and $500 fine, Stephen B. Rochelle six months in jail and $500 fine, William Masse $500 fine, Lewis Hazen Sword $500 fine.

Petitioners timely moved to have the sentences remitted to those received in county court, which motion was denied by the Circuit Court (TT. 123-38).

The petitioners then appealed to the Supreme Court of Virginia. Following argument that court held (1) that the state trespass statute was applicable to public property, App., *infra*, pp. 4a-6a, (2) that the petitioners' conduct was not constitutionally protected, relying entirely on the

---

[4] As to one of the seven petitioners there was a factual issue concerning whether he had heard the Dean's request to leave.

Fourth Circuit's decision in *Sword* v. *Fox, supra,* and (3) that the severely increased sentence imposed following the petitioners' appeal and trial *de novo* was not a denial of due process, App., *infra,* pp. 8a-11a.

It is to review that decision that petitioners seek a writ of certiorari.

How the Federal Questions Were Raised

The petitioners raised their First Amendment issues by way of motion to the Rockingham County Court and the Circuit Court of Rockingham County, and in the brief to the Supreme Court of Virginia. The enhanced sentencing issue was raised by motion in the Circuit Court of Rockingham County and on appeal to the Supreme Court of Virginia. Both sets of issues were ruled upon by that Court. App., *infra,* pp. 4a-7a, 8a-11a.

REASONS FOR GRANTING THE WRIT

1. The Court should determine whether a general criminal trespass statute can constitutionally be applied to punish peaceful, non-disruptive assembly and protest in a public place where the participants have a right to be.

The broad question posed by this case is the extent to which a general criminal trespass statute can validly be applied to interdict and punish peaceful, non-disruptive First Amendment activity which occurs on a college campus.[5] These petitioners, six students in good standing and

[5] The same Virginia trespass statute was involved in *Lusby* v. *Virginia,* No. 71-525, *cert. denied,* 40 U.S. Law Week 3480 (1972) (Justices Douglas and Stewart dissenting).

one faculty member of Madison College, find themselves in criminal jeopardy because a precise answer to this question has not been forthcoming. In recent years, this Court has ruled upon the validity and application of such statutes on only one occasion, in *Adderly* v. *Florida*, 385 U.S. 39 (1966). The facts here are distinguishable from *Adderly*, and the petitioners submit that their activity was protected under relevant First Amendment principles.

The petitioners engaged in exemplary and courteous assembly and petition. They went "in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where [they had] every right to be . . ." *Brown* v. *Louisiana*, 383 U.S. 131, 141 (1966). The place where they gathered was always open to the college community generally. It was both the object of protest and contained the relevant audience. See *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, 319 (1968); *Wolin* v. *Port of New York Authority*, 393 F.2d 83, 89-90 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968). And concededly, as in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), there was absolutely no "disorder or disturbance . . . [or] interference, actual or nascent, with the school's work or . . . collision with the rights of other students to be secure and to be let alone". *Id.* at 508. Of course, the mere fact that the activity occurred inside a building can be no basis for withholding First Amendment protection. See *Brown* v. *Louisiana, supra; Unemployed Workers Union* v. *Hackett*, 332 F. Supp. 1372 (D. R.I. 1971) (invalidating a ban on leafleting a state employment office). Thus, had this activity occurred outside the campus, it could not have been criminally punishable.

The sole reason that it was, and the sole cause of Dean Fox's instructions to the petitioners to leave Wilson Hall, was that the college regulation prohibited "demonstrations . . . inside any buildings . . ." The Supreme Court of Virginia, relying on the fact that the Fourth Circuit had held the regulation to be reasonable, rejected the claim that the statute could not constitutionally be applied to the petitioners' conduct. In our certiorari petition in *Sword,* at pp. 9-13, we indicated why the regulation was inconsistent with First Amendment principles. District Judge Merhige agreed, and two Justices of this Court would have granted certiorari to review the Fourth Circuit's contrary conclusion. Certainly where the validity of a regulation is in such doubt, it should not be allowed, without further consideration, to serve as the basis for the imposition of substantial fines and penal confinement. Upholding this regulation for purposes of academic punishment may be one thing, allowing it to justify serious criminal sanction is quite another.

2. This Court should resolve the decisional conflict as to whether a defendant who appeals his conviction from a state non-record court may receive a harsher sentence following a trial *de novo* in a court of record.

The facts of this case clearly raise the important issue of harsher sentence on appeal. The petitioners, the court, and the prosecuting attorney all agreed on an appropriate punishment in the court not of record, given the fact of conviction. Yet, on appeal, when a jury trial was imposed on petitioners by the court, the prosecution asked for and received a harsher penalty, without any attempt to demonstrate intervening factors which might show that a harsher sentence was justified.

The importance of the issue is evidenced by the fact that this Court has previously granted review in order to resolve it. See *North Carolina* v. *Rice,* 40 U.S. Law Week 4073 (1971) *(per curiam) (vacated and remanded on grounds of possible mootness).* The issue is also before the Court in *Colton* v. *Kentucky,* No. 71-404, recently argued, which involves a pattern almost identical to the one here.

North Carolina v. *Pearce,* 395 U.S. 711 (1969) teaches that the Due Process Clause prohibits the state from imposing a harsher sentence as a means of teaching appellants a lesson. The Fourth Circuit, in *Wood* v. *Ross,* 434 F.2d 297 (4th Cir. 1970), *app. sub nom., North Carolina* v. *Rice, supra* and more recently in *Terry* v. *Superintendent of Field Unit No. 9,* 454 F.2d 591 (4th Cir. 1972), has applied this principle to hold that the state may not impose a harsher sentence on an appeal to a court of record unless the record reflects the reasons for doing so. The court below rejected the Fourth Circuit rule in favor of the contrary position reflected in *Lemieux* v. *Robbins,* 414 F.2d 353 (1st Cir. 1969), *cert. denied,* 397 U.S. 1017 (1970).

The situation here reflects the wisdom of the Fourth Circuit rule. Indeed, it is even more aggravated than in *Wood* v. *Ross.* Virginia has provided the trial *de novo* as the only conduit through which one convicted in a non-record court can seek review of a point of statutory or constitutional law by the Virginia Supreme Court. No appeal on the record alone lies in such a case. *Va. Code Ann.* Section 16.1-136 (1960 repl. vol.). The Circuit Court Judge here insisted on a jury trial even though six of the seven petitioners made it clear that they had appealed only to challenge the law. In Virginia, as elsewhere, questions of law

are for the court alone. The only reasonable inference is that the Court anticipated that the jury would deal harshly with the petitioners and insisted on a jury trial as punishment or harassment for taking the appeal. Similarly, the prosecuting attorney, having agreed to nominal fines following the non-record trial, now called for hasher sentences and claimed that the offenses were very serious. Of course, there was no demonstration of any intervening events to justify the harsher sentence.

Perhaps the insistence on a jury trial by itself would not have been error if the court had limited the punishment to that imposed in the lower court; this would have satisfied the reasons and result of *North Carolina* v. *Pearce, supra.* However, the timely motion to remit sentence to that of the lower court was denied by the Circuit Court, thus completing the punitive action against petitioners for taking the appeal.

This Court should review this case simply on the grounds of *Wood* v. *Ross, supra.* The additional factor of clear punitive intent by the judge and prosecutor makes such review imperative.

CONCLUSION

For the reasons set forth above the petition for certiorari should be granted.

Respectfully submitted,

JOHN C. LOWE
American Civil Liberties
Union of Virginia
1111 West Main Street
Charlottesville, Virginia 22903

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010

Attorneys for Petitioners

F. GUTHRIE GORDON, III
LOWE & GORDON
1111 West Main Street
Charlottesville, Virginia 22903

Of Counsel

April 17, 1972

APPENDIX

Decision of the Supreme Court of Virginia

OPINION BY JUSTICE THOMAS C. GORDON, JR.

Richmond, Virginia, January 17, 1972

Present: All the Justices

Record No. 7749

EDWARD DEVINE JOHNSON, JR.

—v.—

COMMONWEALTH OF VIRGINIA

Record No. 7750

ROBERT FRANK EVANS

—v.—

COMMONWEALTH OF VIRGINIA

Record No. 7751

WILLIAM MASSIE

—v.—

COMMONWEALTH OF VIRGINIA

Record No. 7752

JAMES W. MCCLUNG

—v.—

COMMONWEALTH OF VIRGINIA

Record No. 7753

JAY GARLAND RAINEY

—v.—

COMMONWEALTH OF VIRGINIA

Record No. 7754

STEPHEN B. ROCHELLE

—v.—

COMMONWEALTH OF VIRGINIA

Record No. 7755

LEWIS HAZEN SWORD

—v.—

COMMONWEALTH OF VIRGINIA

FROM THE CIRCUIT COURT OF ROCKINGHAM COUNTY

Hamilton Haas, Judge

On April 24, 1970, a group of students of Madison College, a State institution, applied for permission to hold a "vigil" or protest gathering in Wilson Hall, the administration building of the College. The Dean of Student Services denied the application because the "vigil" qualified as a demonstration under College regulations and the regulations forbade a demonstration in a College building. Nevertheless, students and at least one member of the faculty, including all the defendants in this case, gathered in Wilson Hall on the night of April 26 to hold a "vigil".

College officials requested those in the building, including the defendants, to leave and warned them of the consequences if they did not leave. The defendants and others who did not leave the building were arrested and charged with trespass.[1]

The defendants were tried in the County Court of Rockingham County (a court not of record), convicted and fined $100 each.[2] Upon appeal to the Circuit Court of Rockingham County (a court of record), they were tried by a jury, which found them guilty and fixed sentences as follows:

McClung—9 months in jail and $1,000 fine

Rainey and Rochelle—6 months in jail and $500 fine, each

Johnson, Evans, Massie and Sword—$500 fine, each.

The defendants are now before us on appeal from the orders of the Circuit Court sentencing them in accordance

---

[1] Defendants Edward D. Johnson, Robert Evans, William Massie, Jay Garland Rainey, Stephen B. Rochelle and Lewis H. Sword were students, and defendant James McClung was a member of the faculty. Defense counsel contend the evidence does not show that defendant Evans was present when the group was requested to leave the building. We find, however, that the evidence supports the jury's finding that he was present.

The evidence leading to, and the incidents of, the "vigil" on the night of April 26, 1970 are more fully described in the opinion of the Fourth Circuit in *Sword* v. *Fox, infra* n. 2.

[2] Before the defendants were sentenced in the county court, Lewis H. Sword, Stephen B. Rochelle, Jay G. Rainey and certain others filed a complaint in the United States District Court for the Western District of Virginia. They sought a declaratory judgment that the College regulations, under which the application for the "vigil" was denied, were constitutionally invalid as overbroad and vague and as impermissible restraints on freedom of speech and assembly. The District Court granted the relief sought, *Sword* v. *Fox*, 317 F. Supp. 1055 (W.D. Va. 1970); but on appeal the Fourth Circuit reversed, *Sword* v. *Fox*, 446 F.2d 1091 (4th Cir. 1971), *cert. denied*, —— U.S. —— (1971).

with the jury verdict. Four of the points raised by defense counsel merit discussion.

I

Whether the Trespass Statute Applies to Public Property

Defense counsel contend that Code § 18.1-173, the trespass statute under which the defendants were charged, does not apply to Wilson Hall because it is owned by the Commonwealth.[3]

In *Miller* v. *Harless*, 153 Va. 228, 149 S.E. 619 (1929), however, we held that a similar trespass statute, Va. Code Ann. § 3338 (1928), applied to property of a State institution, Virginia Polytechnic Institute. Although the language of Code § 3338 differed from the language of present Code § 18.1-173, we find nothing in the language of the two sections to indicate any distinction respecting their applicability to public as well as private property.[4]

It is true, as pointed out by the Court in the *Miller* case and by defense counsel in this case, that the Board of Visitors of VPI had been granted (among other powers)

---

[3] "§ 18.1-173. *Trespass after having been forbidden to do so.*— If any person shall without authority of law go upon or remain upon the lands, buildings or premises of another, . . . after having been forbidden to do so . . . by the owner, lessee, custodian or other person lawfully in charge thereof, . . . he shall be deemed guilty of a misdemeanor . . . ".

" • • • "

Va. Code Ann. § 18.1-173 (1960).

[4] Code § 3338, which was applicable in *Miller* v. *Harless, supra,* proscribed first the unauthorized hunting on property "of another". The section then provided that "if any person after being warned not to do so by the owner, or his agent, shall go upon the property of the said owner, he shall . . . be deemed guilty of a misdemeanor . . . ". Va. Code Ann. § 3338 (1928).

the power "to prohibit entrance to said property [property of VPI] of undesirable and disorderly persons, or to eject said persons from said property, and to prosecute under the laws of the State trespassers and persons committing offenses on said property." Va. Code Ann. § 864 (1924). But in holding Code § 3338 applicable to a trespass upon VPI property, the Court necessarily held that section applicable to publicly owned property. Otherwise, a trespasser upon VPI property could not have been prosecuted under § 3338, whether at the instance of the Board of Visitors or anyone else. So we agree with the Attorney General that the *Miller* case is direct and controlling authority against defense counsel's position in this case.

Defense counsel rely principally upon the following statement in *Hall* v. *Commonwealth*, 188 Va. 72, 77, 49 S.E.2d 369, 371 (1948), involving a prosecution of Jehovah's Witnesses for trespass while engaged in distributing religious tracts:

> "The only purpose of this law [the trespass law now codified as § 18.1-173] is to protect the rights of the owners or those in lawful control of private property".

But that statement was made in the context of a controversy whether the trespass statute could be applied, consistently with First and Fourteenth Amendment guarantees, to the use of passageways in a privately-owned apartment building. The *Hall* case did not involve the applicability of the trespass statute to property owned by the Commonwealth.

The statement in *Hall* v. *Commonwealth, supra,* was repeated in *Price* v. *Commonwealth*, 209 Va. 383, 387, 164 S.E.2d 676, 679 (1968). Nevertheless, the Court in *Price*

decided merely that a trespass statute (Code § 18.1-365, the language of which is similar to Code § 18.1-173) did not apply to a public street. The holding in *Price* is consistent with *Miller* v. *Harless, supra,* which expressly recognized that the trespass statute there involved did not apply to walkways and driveways on the VPI campus.

Despite the dictum in *Hall* v. *Commonwealth, supra,* and its repetition in *Price* v. *Commonwealth, supra,* our decisions in those cases are not inconsistent with our decision in *Miller* v. *Harless, supra.* Before our decision today, *Miller* stood for the proposition that a trespass statute like Code § 18.1-173 applies to publicly owned property other than thoroughfares. We now reaffirm that proposition.

II

Whether the Defendants Had a Constitutional Right to Be and Remain in Wilson Hall on the Night of April 26, 1970

Defense counsel contend that since the First Amendment guarantees the defendants the right of protest they were exercising in Wilson Hall on the night of April 26, 1970, they cannot be convicted of trespass for being and remaining there that night.

The record before us supports the finding made by the Fourth Circuit in *Sword* v. *Fox, supra,* n. 2: "What was denied these students—and all that was denied them—was the right to demonstrate by a 'sit-in' *specifically in Wilson Hall.* It is thus not the *right* to protest but the *place* of protest that was regulated and is involved in this appeal." 446 F.2d at 1095.

For the reasons set forth in the opinion of the Fourth Circuit in *Sword* v. *Fox, supra,* we hold that the defen-

dants had no constitutional right to be and remain in Wilson Hall on the night of April 26, 1970.

III

Whether the Trial Judge Improperly Commented on the Defendants' Failure to Testify

In his closing argument, defense counsel remarked "that these students were there [in Wilson Hall] in good faith, they were there sincerely and conscientiously". The Commonwealth's Attorney objected on the ground that the evidence did not support the remark.

When defense counsel expressed "shock" at the objection of the Commonwealth's Attorney, the court stated: "What I think Mr. DePoy [the Commonwealth's Attorney] meant was that there has been no explanation by any of the defendants as to what really transpired or why they did this or anything else." Defense counsel immediately moved for a mistrial on the ground that the court had commented on the failure of the defendants to take the stand.

The court denied the motion for a mistrial, after advising the jury:

> "The court charges the jury and tells the jury that an accused person does not have to take the stand, that he is at liberty to remain off the witness stand if he wishes. He does not have to testify and his failure to testify cannot be considered by the jury in any way as prejudicial to him or creating any inference of his guilt or his involvement. It is a privilege that any accused person has and I think the dialogue between the objecting prosecutor and the defense counsel gave rise to the court's utterance, and was justified."

Defense counsel assigns error to the court's failure to grant a mistrial.

We find no error. Defense counsel's remarks gave reason for the court's remark. And the court correctly and fully advised the jury respecting the defendants' right to remain silent.

IV

Whether the Increased Sentence Imposed in the Court of Record Violated Due Process

Defense counsel contend that the Circuit Court of Rockingham County unconstitutionally sanctioned a more severe sentence than that imposed by the County Court. Despite our holding in *Evans* v. *Richmond,* 210 Va. 403, 171 S.E.2d 247 (1969), that a more severe sentence is not constitutionally impermissible under these circumstances, counsel attack the increased sentence because of its "chilling" effect on the defendants' right of appeal to the circuit court.

In *Wood* v. *Ross,* 434 F.2d 297 (4th Cir. 1970), the court reached the opposite conclusion from *Evans.*[5] The Fourth Circuit in that case expressed its disagreement not only with *Evans* but also with the First Circuit's decision in *Lemieux* v. *Robbins,* 414 F.2d 353 (1st Cir. 1969), which reached the same conclusion as *Evans.* We will now reexamine *Evans.*[6]

---

[5] The Supreme Court granted certiorari to review the judgment in *North Carolina* v. *Rice,* 434 F.2d 297 (4th Cir. 1970), a companion case in which the Fourth Circuit reached the same conclusion as in *Wood* v. *Ross, supra.* 401 U.S. 1008. On December 14, 1971, the Supreme Court vacated the judgment of the Fourth Circuit in *Rice* and remanded the case for reconsideration of the question of mootness, without reaching the question we are now considering. *North Carolina* v. *Rice,* —— U.S. —— (1971).

[6] We cannot ignore a practical consideration, the power of federal courts to grant habeas corpus if they disagree with our interpreta-

We are of course bound by *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), to the extent that it is applicable here. *Pearce* tell us that:-

> "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

Id. at 725.

Pearce was convicted of a felony and sentenced by a trial judge to imprisonment for twelve to fifteen years. In a post conviction proceeding, he secured a reversal of his conviction on the ground that an involuntary confession had been admitted in evidence against him. Pearce was retried, convicted and sentenced by the trial judge to a longer prison term than originally imposed.[7] The Supreme Court held that the increased punishment violated due process.

Vindictiveness in the imposition of sentence, against which *Pearce* levels its main thrust, is lacking in the cases now before us. The jury, which fixed the defendants' sen-

---

tion of the Constitution of the United States. At the same time, we cannot abdicate for reasons of expediency our function of deciding questions properly before us involving the Constitution of the United States, in the light of decisions of the Supreme Court and subject to correction by that Court.

[7] At the second trial, Pearce was "sentenced by the trial judge to an eight-year prison term, which, when added to the time Pearce had already spent in prison, the parties agree amounted to a longer total sentence than that originally imposed". *North Carolina* v. *Pearce, supra* at 713.

tences in the circuit court, cannot be deemed to have increased the sentences imposed in the county court to punish the defendants for exercising their right to appeal. To assume that the jurors even knew of the sentences imposed by the county court would assume they had information not rightfully theirs.

There are yet other differences between Pearce's case and these cases.

In Pearce's case, the right to a new trial was predicated and dependent on error in the first trial. And, in the words of the First Circuit, the "very proof of error [gave] the state the opportunity to increase the punishment." *Lemieux* v. *Robbins, supra* at 355.

In these cases, the defendants' appeal to the circuit court was not predicated or dependent on error in the trial in the county court. In fact, their appeal to the circuit court was not an appeal in the usual sense of the word. Rather, the defendants' "appeal" was an exercise of the unqualified right to a trial de novo, which gave them a second full opportunity for acquittal.

To view the Virginia procedure as forcing an accused to lose the "benefit" of the county court sentence and as "chilling" his right to appeal begs the point. The State could constitutionally afford an accused the right to only one original trial. One trial in the circuit court would satisfy all constitutional guarantees.

Instead, the State gives an accused the benefit of two full opportunities for acquittal in the long run interest of speedy trial in the county court and reducing the load of the circuit court. If an accused elects to take advantage of a second and fresh opportunity, it appears entirely fair that the accused and the State should start again at parity, as contemplated under the Virginia procedure.

Pearce, even if it should be applied full force to an "appeal" to a circuit court, does not mean that no "chilling effect" can ever be attached to an appeal. Instead, *Pearce* lays down a rule of reasonableness. See *Lemieux* v. *Robbins, supra* at 355. And the Virginia procedure, as applied to the defendants in this case, supports a legitimate state interest and is fair and reasonable.

In short, we agree with what the First Circuit said in *Lemieux* v. *Robbins, supra,* much of which we have repeated. See also *State* v. *Spencer,* 276 N.C. 535, 173 S.E.2d 765 (1970); *State* v. *Sparrow,* 276 N.C. 499, 173 S.E.2d 897 (1970). Accordingly, we adhere to *Evans* v. *Richmond, supra.*

Affirmed.

Madison College Regulations

Regulations on Demonstrations and Peaceful Assembly

Madison College seeks to preserve and to encourage the exercise of the rights of expression, conscience, affiliation, and peaceful assemblage. The College is equally mindful that a reasonable and lawful scheduling and assignment of College facilities, resources, and personnel consistent with the civil liberties expressed in the first amendment of the United State Constitution, are necessary in order to assure the pursuit of educational programs, to accommodate the needs of all persons, and to respect the rights of all members of the College Community.

The orderly conduct of classes is basic to the primary purpose of the College. Demonstration procedures are established to guarantee the continuation of this function and the continued health and safety of the members of the campus community. The College neither permits nor forbids demonstrations off campus by students or student organizations. The students or student organizations demonstrating off campus are reminded that they are expected to act in a manner that will conform to all national, state, and municipal laws and ordinances. The College is particularly concerned that this responsibility be fulfilled when students or student organizations demonstrating off campus identify themselves as students of Madison College.

A demonstration is considered to be a public manifestation of welcome, approval, protest, or condemnation as by a mass meeting, procession, picketing, or occupation of premises. (Exhibitions commonly associated with social or athletic activities are not within the purview of this policy and its supporting regulations.)

In order to achieve all purposes above, to provide regulations in the event of demonstrations on campus by students or student organizations, and to assure the administration of this policy consistent with all the purposes expressed above, the following procedures are established:

1. The demonstration is to be registered with the Office of Student Activities 48 hours in advance.
2. At the time of registration, the student is advised regarding reasonable demonstration activities.
3. Demonstrations are not to block traffic.
4. Demonstrations are forbidden in the areas of the Health Center, inside any buildings and congregating in the locations of fire hydrants. The appropriate areas for demonstrations will be determined at the time of the request.
5. The number of pickets may be limited by reasonable consideration of space in the proposed demonstration areas. Students are to be informed of this at the time of registration.
6. The right of expression is not to be confused with license to incite violence or to use indecent language, because these are beyond legal and reasonable espousal of any cause for which demonstrations are conducted.
7. If disturbance from observers begins to develop, the demonstrators are expected to refrain from altercations with observers.
8. Observers are expected to maintain a reasonable distance between themselves and the demonstrators at all times.

9. Observers may not obstruct legitimate demonstrations by physically blocking the path, by blocking other observers, throwing objects, or in any way acting to limit the right of free expression.

10. Both demonstrators and observers are expected to follow the directions of the Campus Police.

The Director of Student Activities shall submit to the Dean of Student Services a summary of the advice given the applicants for demonstrators, and inform the Chief of the Campus Security Force of the proposed demonstration.

The Dean of Student Services assigns one or more of the members of his staff to observe the demonstration. A complete report is made by the observing representative on the following day. This is kept on file.

In the event that an assembly appears to be a demonstration related to grievances, those present should be advised that orderly procedures for the hearing of grievances are available and must be adhered to. Such procedures include: the "open door" policy of the President of the College, the Provost and Assistant Provost of the College, the Business Manager, the Dean of Student Services, and his administrative staff, as well as the open meetings with students held monthly by the President and Administrative Council of the College. College officials will not negotiate with groups under conditions of duress, such as unauthorized occupation of College property.

Penalties

Students of the College are expected to conduct themselves as ladies and gentlemen both within the College and elsewhere. For student conduct which is outside the jurisdiction of the College but which tends to discredit or injure

the College, the President is authorized by the Board of Visitors to impose such penalty as he may deem appropriate, including expulsion from the College. This responsibility is implemented by the Faculty Judiciary Committee, subject to review by the President.

Any student found guilty of participating in or inciting a riot or an unauthorized or disorderly assembly is subject to suspension.

When an assembly of students not authorized by the Dean of Student Services, the Dean of Men, or the Deans of Women has been requested to disband by the President or by an officer of the Student Government Organization or Student Government Association, or by a dean or other administrative officer, those students refusing to comply will be subject to immediate suspension.

Appeals

Any student or student organization convinced in good faith that arbitrary, unlawful, or unreasonable limitations have been imposed upon any demonstration or proposed demonstration, or any student or student organization subjected to disciplinary action under the provisions of this policy may appeal to the Faculty Judiciary Committee.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 19 1972
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1971

No. 71-1337

EDWARD D. JOHNSON, ET AL.,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ANDREW P. MILLER
Attorney General of Virginia

WILLIAM G. BROADDUS
D. PATRICK LACY, JR.
Assistant Attorneys General

Supreme Court Building
Richmond, Virginia 23219

Counsel for Respondent

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
PRIOR PROCEEDINGS	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR DENYING THE WRIT	9
ARGUMENT:	
I. Petitioners' Conduct In Violation Of Constitutionally Valid College Rules And Directives Of The Rector And President Of The College And In Violation Of A Constitutionally Valid Criminal Statute Of The Commonwealth Is Not Entitled To First Amendment Protection.	9
II. It Is Not A Denial Of Due Process To Permit Petitioners To Receive Harsher Penalties In A *De Novo* Trial In The Court Of Record Than They Received In The Court Not Of Record When They Requested The *De Novo* Trial And The Jury Which Prescribed Their Punishment Was Never Advised Of Their Prior Convictions.	15
CONCLUSION	19
CERTIFICATE OF SERVICE	20

APPENDIX

A. Opinion of the Court of Appeals in *Sword* v. *Fox*

TABLE OF CITATIONS

Page

Cases

Adderly v. Florida, 385 U.S. 39 (1966), rehearing denied, 385 U.S. 1020 (1967) 10, 13, 14, 15, 19

Crampton v. Ohio, 402 U.S. 183 (1971) 16

Evans v. Richmond and Commonwealth, 210 Va. 403, 171 S.E.2d 247 (1969) 15

Lemieux v. Robbins, 414 F.2d 353 (1st Cir. 1969), cert. denied 397 U.S. 1017 (1970) 17, 18

McGautha v. California, 402 U.S. 183 (1971) 16

North Carolina v. Pearce, 395 U.S. 711 (1969) 16, 18

Sword v. Fox, 317 F.Supp. 1855 (E.D. Va. 1970) 3, 10, 11, 12, 13

Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971) cert. denied ..... U.S. ....., 30 L.Ed.2d 547 (1971) 3, 7, 9, 10, 11

Walsh v. Picard, 328 F.Supp. 427 (D. Mass. 1971), aff'd 446 F.2d 1209 (1st Cir. 1971) 17

Wood v. Ross, 434 F.2d 297 (4th Cir. 1970) 16, 17

Statutes

Code of Virginia:

§ 16.1-132 4

§ 16.1-136 5

§ 18.1-173 ..... 4, 14

§ 23-164.6 5

Rules

Rules of the Supreme Court of the United States:

Rule 16 19

Rule 19 ..... 1, 20

Supreme Court of the United States

October Term, 1971

No. 71-1337

EDWARD D. JOHNSON, ET AL.,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Virginia

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Respondent, believing that the matters set forth herein will demonstrate the lack of substance in the questions sought to be reviewed by Petitioners, files this brief in opposition and prays that this Court refuse to issue the writ of certiorari sought by Petitioners because the opinion of the Supreme Court of Virginia is plainly correct and does not merit review under any of the considerations contained in Rule 19 of the Rules of the Supreme Court of the United States.

PRIOR PROCEEDINGS

The Petitioners were arrested during the evening of April 26, 1970, on the charge of trespassing in Wilson Hall in violation of § 18.1-173 of the Code of Virginia. Madison College officials had previously directed Petitioners to leave Wilson Hall, the main administration building at Madison College.

Petitioners were tried in the County Court of Rockingham County, a court not of record. They were found guilty and each was given a fine of $100. Petitioners "appealed" to the Circuit Court of Rockingham County, a court of record, where, on June 30, 1970, they were given a *de novo* trial before a jury which was not advised of the earlier court proceedings. Because of the similarity of the issues in all cases, Petitioners were tried jointly.

The jury found the Petitioners guilty and assessed their punishment as follows: James W. McClung, 9 months' confinement in jail and $1,000 fine; Jay Garland Rainey and Stephen Rochelle, 6 months' confinement in jail and $500 fine each; Robert Frank Evans, William Masse, Edward Devine Johnson, Jr., and Lewis Hogen Sword, $500 fine each.

Thereafter, the trial court imposed the penalties contained in the jury's verdict but stayed execution pending an appeal to the Supreme Court of Virginia.

At a subsequent hearing on July 6, 1971, the trial court denied Petitioners' motions to suspend a portion of the sentences and to remit the sentences to the same level as had been imposed by the county court.

Appeals to the Supreme Court of Virginia were later perfected and writs of error were granted to review the proceedings. The cases were briefed and argued orally before that Court. On January 17, 1972, the Supreme Court

of Virginia rendered its opinion affirming the Petitioners' convictions. Petitioners subsequently filed a petition in this Court for a writ of certiorari to the Supreme Court of Virginia.

Petitioners were also disciplined by Madison College for activities arising out of the same incident which gave rise to these criminal charges. Petitioners Lewis H. Sword, Stephen B. Rochelle, and Jay G. Rainey and others filed a class action complaint in the United States District Court for the Eastern District of Virginia seeking a declaratory judgment that the Madison College Rules proscribing their demonstration in Wilson Hall were constitutionally invalid. The District Court, on motion for summary judgment, granted the Petitioners the relief sought. *Sword* v. *Fox*, 317 F.Supp. 1055 (1970).

The United States Court of Appeals for the Fourth Circuit reversed the District Court's decision and ordered that the complaint be dismissed. *Sword* v. *Fox*, 446 F.2d 1091 (4th Cir. 1971).[1] In doing so, Judge Russell, joined by Judges Bryan and Butzner, ruled that the Madison College Rules are constitutionally valid and that the College discipline imposed upon these students for violation of the Rules was a lawful exercise of the College's authority. Petitioners filed a petition for a writ of certiorari to review the opinion of the Court of Appeals but this Court refused to grant the writ. ..... U.S. ....., 30 L.Ed. 2d 547 (1971).

QUESTIONS PRESENTED

1. Whether Petitioners' conduct which violated both College Rules which have been held to be constitutionally valid by the United States Court of Appeals and a constitu-

[1] A copy of the Fourth Circuit's opinion is appended to this brief as Appendix A.

tionally valid criminal statute of the Commonwealth of Virginia is entitled to the protection of the First Amendment?

2. Whether it is a denial of due process to permit Petitioners to receive harsher penalties in a *de novo* trial in the court of record than they received in the court not of record when they requested the *de novo* trial, and the jury which prescribed their punishment was never advised of their prior convictions?

STATUTES INVOLVED

Virginia Code § 18.1-173 provides in pertinent part as follows:

> § 18.1-173. Trespass after having been forbidden to do so.—If any persons shall without authority of law go upon or remain upon the lands, buildings or premises of another . . . after having been forbidden to do so, either orally or in writing, by the owner, lessee, custodian or other person lawfully in charge thereof . . . he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by confinement in jail not exceeding twelve months, or by both such fine and imprisonment.

Virginia Code § 16.1-132 provides as follows:

> § 16.1-132. Right of appeal.—Any person convicted in a court not of record of an offense not felonious shall have the right, at any time within ten days from such conviction, and whether or not such conviction was upon a plea of guilty, to appeal to the circuit court of the county or corporation or hustings court of the corporation, as the case may be. There shall also be an appeal of right from any order or judgment of a court not of record forfeiting any recognizance or revoking any suspension of sentence.

Virginia Code § 16.1-136 provides as folows:

> § 16.1-136. How appeal tried.—Any appeal taken under the provisions of this chapter shall be heard de novo in the appellate court and shall be tried without formal pleadings in writing; and except in the case of an appeal from any order or judgment of a court not of record forfeiting any recognizance or revoking any suspension of sentence, the accused shall be entitled to trial by a jury in the same manner as if he had been indicted for the offense in the circuit or corporation court.

Virginia Code § 23-164.6 provides in pertinent part as follows:

> § 23.164.6. Rights and powers of board generally.—The board [of Visitors of Madison College] shall be vested with all the rights and powers conferred by this chapter insofar as the same are not inconsistent with the laws of the State.
>
> The board . . . shall make all needful rules and regulations concerning the College, appoint the president, who shall be its chief executive officer, . . . and generally direct the affairs of the College.

STATEMENT OF THE CASE

Petitioners, with the exception of Evans, have conceded that they were present in Wilson Hall on April 26, the evening in question; that Dr. Fox, Dean of Student Services, ordered them to leave Wilson Hall; and that, despite this order, they refused to leave[2] (R. 2, 6, 9, 25, 35). As stated in Petitioners' opening brief filed in the Supreme Court of Virginia, "All of the Appellants except Evans conceded the facts and only contested the law being ap-

[2] R. will be used in this brief to denote the unprinted transcript of the trial held in the Circuit Court of Rockingham County.

plied. . . ." (Brief 2). Evans does not now contend that there was insufficient evidence to sustain his conviction.

The incident giving rise to these arrests concerned the Petitioners' violation of certain Madison College Rules which the United States Court of Appeals for the Fourth Circuit recently upheld as constitutional. These rules which were adopted three years prior to the incident in question are as follows:

> A demonstration is considered to be a public manifestation of welcome, approval, protest or condemnation as by a mass meeting, procession, picketing, or occupation of premises. (Exhibitions commonly associated with social or athletic activities are not within the purview of this policy and its supporting regulations.)
>
> Rule 1: The demonstration is to be registered with the Office of Student Activities 48 hours in advance.
>
> * * *
>
> Rule 4: Demonstrations are forbidden in the areas of the Health Center, inside any buildings and congregating in the locations of fire hydrants. The appropriate areas for demonstrations will be determined at the time of the request.

If the student gathering is a meeting which does not fall within the definition of a demonstration, then College regulations permit students to use available building space. There is no evidence to suggest that the College ever attempted to regulate the content of First Amendment expression at such meetings.

If a student gathering falls within the definition of "demonstration," then registration must be made with the Director of Student Activities who registers demonstrations. Uncontradicted testimony accepted by the Court of Appeals demonstrated that over the years the administrators

have gained sufficient experience to determine whether the gathering is a meeting or a demonstration. Not only do the students understand the differentiation, they have made no claim that they do not. Moreover, the students unhesitatingly attempted to register the demonstration here in question pursuant to the regulations governing demonstrations.

As found by the Court of Appeals in *Sword* v. *Fox*, 446 F.2d at 1093:

> One of the witnesses called by the plaintiffs, a student who had engaged in the "sit-in" involved in this action, testified that, while written application to register a demonstration was required, the registrant did not set forth thereon the purpose of the demonstration, only the time the demonstration was to begin and the areas where it was to be held; and that except for "making a few changes in some of the areas where the demonstration was to be held," "automatic approval" of the registration followed. [Footnote omitted.] Thus the regulations, neither by their language nor by their application, are instruments for censoring or controlling the purpose or content of a demonstration.

The Court of Appeals further found that no attempt was made to control or even influence the purpose of the students' demonstration here in question, or, so far as the record shows, any other demonstrations on campus.

The material facts are relatively simple. On Friday, April 24, a group of students tried to register a demonstration to be held over 48 hours hence in Wilson Hall on Sunday, April 26. Because one of the Rules prohibits the holding of a demonstration inside any building, Dean Fox refused to accept the registration (R. 29, 43).

On Sunday evening, April 26, a group of students, including all Petitioners, proceeded to hold the unregistered demonstration in Wilson Hall in violation of the Rules.

The circulation of handbills advertising the unregistered demonstration and soliciting support for it gave advance warning to Dean Fox of Petitioners' impending activity and he proceeded to organize his staff (R. 30-31). Part of this preparation included conferences with Dr. G. Tyler Miller, then President of Madison College, and Russell Weaver, Rector of the College's Board of Visitors (R. 31).

During the early stages of the demonstration, Gene Wagner, Madison's Director of Buildings and Grounds, went to Wilson Hall along with Randall Monger, the College's Chief of Security. Before Dean Fox arrived, Chief Monger, at the direction of Mr. Wagner, warned the students who were then demonstrating inside Wilson Hall and asked them to leave (R. 13, 21-32). At the time of this initial warning to leave, there were 50-60 students gathered in the lobby of the building. Some left and a short time later College officials secured the building (R. 13). The rear door was left open so the students could continue to leave without penalty.

After the building was secured, Rainey, one of the Petitioners and apparently their spokesman, did everything possible to obtain support from the crowd gathered outside, and he urged students to come into the building to join the students inside. Both Rainey and Rochelle, another Petitioner, climbed in and out of the windows of Wilson Hall, and Rainey tried to help other students enter through the windows (R. 13, 15, 16, 20).

After the demonstration materialized, Dean Fox went to Wilson Hall, arriving there at 9:30 P.M., and he addressed the students, including all of the Petitioners, with the possible exception of Evans. At this time Fox advised the students that they were assembled inside Wilson Hall in violation of College Rules. Fox then directed them to leave

and informed them that, if they refused to do so, they would be in violation of another College Rule and of the State trespass law (R. 32). Fox gave the orders pursuant to the directions of Rector Weaver and President Miller (R. 39).

Approximately one half hour later, Dean Fox returned and again gave Petitioners, including Evans, the same warnings and orders to leave the premises (R. 38). The Petitioners were given further opportunity to leave after the second warning, and, when they failed to do so, steps were initiated which ultimately led to their arrest on the charge of trespassing in Wilson Hall.

McClung, who received the stiffest penalty in the Circuit Court of Rockingham County, was a member of the faculty of Madison College. Rainey and Rochelle, who were the leaders of the illegal conduct, were students of Madison College, as were the remainder of the Petitioners.

Three days after the arrests following the demonstration inside Wilson Hall, Petitioners and others properly registered and held a demonstration protesting the same grievances they sought to make known in the demonstration which led to their arrests. *Sword* v. *Fox*, 446 at F.2d at 1094.

REASONS FOR DENYING THE WRIT ARGUMENT

I.

Petitioners' Conduct In Violation Of Constitutionally Valid College Rules And Directives Of The Rector And President Of The College And In Violation Of A Constitutionally Valid Criminal Statute Of The Commonwealth Is Not Entitled To First Amendment Protection.

Petitioners' primary reason for granting the writ appears to be their first argument in which they contend that they had a constitutional right to conduct their demonstration in

Wilson Hall. There are two answers to this argument, either of which compels the conclusion that Petitioners' position is wholly without merit. The first answer rests upon *Sword* v. *Fox,* 446 F.2d 1091 (4th Cir. 1971), cert. denied ..... U.S. ....., while the second rests upon this Court's decision in *Adderly* v. *Florida,* 385 U.S. 39 (1966), rehearing denied, 385 U.S. 1020 (1967).

The answer embodied in *Sword* v. *Fox* is more of a procedural argument. In considering it, one must follow the Petitioners' procedural steps through the courts as they sought to avoid the consequences of their unlawful action.

When it became obvious that they would be punished by Madison College for their conduct, Petitioners fled to the United States District Court for the Eastern District of Virginia to seek a temporary restraining order and further injunctive relief. In that case styled *Sword* v. *Fox,* Petitioners put into issue the constitutionality of the Madison College Rules and the constitutionality of the Madison College disciplinary action which was predicated upon their violation of various Rules, including their refusal to follow Dean Fox's directives to leave Wilson Hall.

While the District Court ruled in favor of the Petitioners, the United States Court of Appeals for the Fourth Circuit reversed the District Court and, in an exhaustive opinion, upheld the Madison College Rules as constitutional and the disciplinary action as within the authority of the College. This Court refused to review the judgment of the Court of Appeals.

Now the Petitioners, in seeking review of the decision of this state criminal case, request this Court to adjudicate the same issues decided adversely to them in ancillary proceedings in the federal courts. In doing so, they seek two independent chances or opportunities at a favorable ruling on

the same issues. The one noteworthy feature of Petitioners' brief is its conspicuous failure to develop the facts of *Sword* v. *Fox*.

As the Court of Appeals found in *Sword* v. *Fox*, 446 F.2d at 1095, 1097,

> What was denied these students—and all that was denied them—was the right to demonstrate by a "sit-in" specifically in Wilson Hall. It is thus not the right to protest but the place of protest that was regulated and is involved in this appeal.
>
> * * *
>
> The regulation involved here, which bans demonstrations in college buildings but not otherwise, tested by the criteria just stated, is reasonable. As has been observed, it does not purport to pass on the purpose of the demonstration. Nor has it been used to deny to students the right to protest on campus, provided only such protests are not carried on within college buildings. Its purpose is manifest. College buildings are generally dedicated to classrooms, administrative offices, libraries, health centers, or dormitories. In all of these, order and study are expected. It can scarcely be argued that demonstrations in a classroom or administration building during the day would not create a disruption in the educational activity of the institution and inconvenience its normal administrative operations. At night, on the other hand, demonstrations in such buildings offer too many opportunities for vandalism, and, in some instances, lawlessness. It is for this reason that demonstrations, even in the public streets, have been prohibited in the nighttime.

This Court refused to grant a petition for a writ of certiorari to review these findings.

Having initiated the action in *Sword* v. *Fox* which resulted in findings adverse to them, Petitioners should not now be allowed to challenge those findings in a collateral

proceeding. They should be estopped from doing so. The issues Petitioners seek to raise here in their first argument are identical to those they put into issue in *Sword* v. *Fox*. To allow them now to challenge the findings of that case will do violence to the well accepted principle that there must be finality to judgments.

As shown by the opinion of th eCourt of Appeals and the opinion of the Supreme Court of Virginia in the instant case, Petitioners had no right to engage in their demonstration inside Wilson Hall. They engaged in that conduct in violation of valid, constitutional College Rules. Petitioners were not peaceful. Not only did they violate College rules and lawful directives of College administrators, they encouraged others to do so. They urged students gathered outside of Wilson Hall to enter the closed building by climbing through its windows, and several of the Petitioners climbed in and out of the building through its windows.

Contrary to Petitioners' representations, the Commonwealth concedes only that Petitioners were not violent. But surely a finding of actual violence need not be made before unlawful activity may be interdicted.

It is the Commonwealth's position that the Petitioners' violation of College Rules and violation of Dean Fox's subsequent attempts to enforce those Rules clearly show that Petitioners were trespassing without authority of law. Even if the Court looks only at the single act of Dean Fox in ordering Petitioners to leave the premises, however, this alone is sufficient to show that Petitioners were acting without authority of law. Dean Fox was acting as the agent of the Rector of the Board of Visitors of Madison College and of the President of the College, the College's chief executive officer. The General Assembly of Virginia has vested the Board of Visitors with authority to govern Madison

College, and Petitioners must be held bound to follow the Board's directives. § 23-164.6 of the Code of Virginia. It is important to note that Petitioners do not now challenge the sufficiency of the evidence to support their convictions.

Should this Court go beyond the earlier decision of *Sword* v. *Fox*, then it must find that this case is governed by *Adderly* v. *Florida*, 385 U.S. 39 (1966), which is squarely in point. In their petition, Petitioners claim that the facts of the instant case are distinguishable from those in *Adderly*. Not surprisingly, however, they fail even to attempt to point out the asserted distinguishing differences.

In *Adderly*, as in this case, college students were convicted of violating a state criminal trespass statute. There, as here, students sought to demonstrate on property where they claimed they had a right to be. Indeed, as Mr. Justice Douglas, dissenting, described the facts of *Adderly*, 385 U.S. at 51-52,

> There was no violence; no threat of violence . . . no plan or plot to do anything but protest. The evidence is uncontradicted that the petitioners' conduct did not upset the jailhouse routine; things went on as they normally would. None of the group entered the jail. Indeed, they moved back from the entrance as they were instructed. There was no shoving, no pushing, no disorder or threat of riot. . . . Never did the students locate themselves so as to cause interference with persons or vehicles going to or coming from the jail. . . . Further, it is undisputed that the entrance to the jail was not blocked. And whenever the students were requested to move they did so.

In *Adderly*, as here, Petitioners were ordered to leave the property by one in authority to control the property. In both cases, the criminal trespass statute was applicable to the property in question. The Supreme Court of Virginia has

so construed § 18.1-173 of the Code of Virginia and that construction is not open to question.

The holding of this Court in the *Adderly* case, as authored by Mr. Justice Black, is equally applicable to the instant case and is dispositive of Petitioners' first argument. In *Adderly,* 385 U.S. at 46-48, this Court held:

> The sheriff, as jail custodian, had power, as the state courts have here held, to direct that this large crowd of people get off the grounds. There is not a shred of evidence in this record that this power was exercised, or that its exercise was sanctioned by the lower courts, because the sheriff objected to what was being sung or said by the demonstrators or because he disagreed with the objectives of their protest. The record reveals that he objected only to their presence on that part of the jail grounds reserved for jail uses. There is no evidence at all that on any other occasion had similarly large groups of the public been permitted to gather on this portion of the jail grounds for any purpose. Nothing in the Constitution of the United States prevents Florida from even-handed enforcement of its general trespass statute against those refusing to obey the sheriff's order to remove themselves from what amounted to the curtilage of the jailhouse. The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate * * *." Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the

> cases petitioners rely on, Cox v. State of Louisiana, supra, at 554-555 and 563-564, 85 S.Ct. at 464 and 480. [Footnote omitted] We reject it again. *The United States Constitution does not forbid a State to control the use of its own property for its own lawful non-discriminatory purposes.* (Italics supplied.)

Adderly plainly demands that Petitioners' first reason for granting the writ be rejected as being completely without merit.

II.

It Is Not A Denial Of Due Process To Permit Petitioners To Receive Harsher Penalties In a De Novo Trial In The Court Of Record Than They Received In The Trial Court Not Of Record When They Requested The De Novo Trial And The Jury Which Prescribed Their Punishment Was Never Advised Of Their Prior Convictions.

Petitioners' final contention is that the imposition of a greater penalty following their *de novo* trial in the Circuit Court of record than that received in the County Court not of record constitutes an unconstitutional chilling effect on their right to appeal and is therefore violative of the Due Process clause of the Fourteenth Amendment.

Section 16.1-132 of the Code of Virginia provides that a person convicted of a misdemeanor in a court not of record shall have the right to appeal to a court of record. Section 16.1-136 of the Code of Virginia provides that the "appeal" shall in fact be a *de novo* trial. As described by the Supreme Court of Virginia in *Evans* v. *Richmond and Commonwealth*, 210 Va. 403, 407, 171 S.E.2d 247, 251 (1969), the effect of § 16.1-136 of the Code of Virginia, "is to provide a statutory grant of a new trial to the accused to be had before a court of record having original criminal jurisdiction, and to annul the judgment of the trial judge as completely as if there had been no previous trial."

It should initially be emphasized that in Virginia sentencing is performed by the jury when the trial is held before that jury as in the instant case. (Note, Jury Sentencing in Virginia, 53 Va.L.Rev. 968 (1967).) There is no separate procedure or portion of the trial for sentencing in Virginia—no bifurcated trial—and the practice in Virginia is similar to those unsuccessfully attacked on constitutional grounds in *McGautha* v. *California,* 402 U.S. 183 (1971) and *Crampton* v. *Ohio,* 402 U.S. 183 (1971), both death penalty cases. This Court held in those cases that such a single-verdict trial does not violate the Constitution.

In concluding that the greater penalty imposed in the *de novo* proceeding is unconstitutional, Petitioners rely upon *North Carolina* v. *Pearce,* 395 U.S. 711 (1969), and *Wood* v. *Ross,* 434 F.2d 297 (4th Cir. 1970). As the Supreme Court of Virginia correctly held below, however, *Pearce* is not applicable to the case presently before us. *Pearce* concerned the situation where a defendant, at his own behest, obtains a reversal of his conviction because of error and then on retrial is convicted and given a harsher sentence than that imposed following his first conviction. In *Pearce,* 395 U.S. at 725, this Court sought only to insure that

> vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

The procedure followed in the case at hand, where Petitioners, as a matter of right, received a *de novo* jury trial, adequately protected them from "retaliatory motivation on

the part of the sentencing judge." In Virginia, it is the jury and not the judge which determines the punishment to be assessed against defendants. And, as in this case, juries are not advised that defendants were convicted of the same crime in a lower court. Thus, there can be no opportunity for the vindictiveness or "retaliatory motivation" which gave rise to this Court's concern in *Pearce*.

In *Wood* v. *Ross, supra,* the Court of Appeals has admittedly gone beyond the dictates of *Pearce*. In *Lemieux* v. *Robbins,* 414 F.2d 353 (1st Cir. 1969), *cert. denied,* 397 U.S. 1017 (1970), the court succinctly articulated two cogent reasons for avoiding the *Wood* v. *Ross* result. Under *Wood* v. *Ross,* either courts not of record will tend to give maximum sentences out of caution, in the interest of the state, which, in turn will have the effect of encouraging "appeals"; or, if the courts not of record tend to give small sentences, the state will be led to avoid the vesting consequences of light punishment by initiating cases in the courts of record in the first instance. See *Walsh* v. *Picard,* 328 F. Supp. 427 (D. Mass 1971), *aff'd* 446 F.2d 1209 (1st Cir. 1971).

As pointed out by the Supreme Court of Virginia below, Virginia's procedure supports a legitimate state interest. In the language of that Court, 212 Va. at 585-86, 186 S.E. 2d at 58:

> To view the Virginia procedure as forcing an accused to lose the "benefit" of the county court sentence and as "chilling" his right to appeal begs the point. The State could constitutionally afford an accused the right to only one original trial. One trial in the circuit court would satisfy all constitutional guarantees.
>
> Instead, the State gives an accused the benefit of two full opportunities for acquittal in the long run interest of speedy trial in the county court and reducing the load of the circuit court. If an accused elects to take

advantage of a second and fresh opportunity, it appears entirely fair that the accused and the State should start again at parity, as contemplated under the Virginia procedure.

Pearce, even if it should be applied full force to an "appeal" to a circuit court, does not mean that no "chilling effect" can ever be attached to an appeal. Instead, *Pearce* lays down a rule of reasonableness. See *Lemieux* v. *Robbins, supra* at 355. And the Virginia procedure, as applied to the defendants in this case, supports a legitimate state interest and is fair and reasonable.

Petitioners argue that the *de novo* trial was the only method available to them by which they could seek a review of the alleged errors committed by the court not of record. *Pearce* clearly recognizes that the states are not required to establish avenues of appellate review. All that is required is that, once established, such avenues be kept clear of unreasoned distinctions. *Pearce,* 395 U.S. at 724. As *Lemieux* and the Supreme Court of Virginia hold, however, it is not unreasonable or even unfair to require a defendant seeking a second opportunity for acquittal in a *de novo* trial to start at parity with the state. *Lemieux,* 414 F.2d at 355. This is especially true where, as here, the jury which determines the punishments was never advised of the proceedings in the court not of record.

Finally, in an apparent attempt to make their cases more appealing, Petitioners refer to the "clear punitive intent by the judge and prosecutor." Not only is the record barren of any factual support for this suggestion, it is the first time Petitioners have raised this claim.

Petitioners did not object or complain when the judge of the court of record ruled that the cases would be heard by a jury. Possibly, the judge sought to insure that fair minded persons who were unaware of the earlier court proceeding

consider and determine the issue. In any event, there is simply no evidence of motive and Petitioners should not be allowed now to raise the issue for the first time. Rule 16, Rules of the Supreme Court of the United States.

Nor is there any evidence of punitive intent harbored by the prosecutor. Who can deny that the actions of a professor and students in planning and carrying out deliberate violations of valid College rules are serious? In any event, Petitioners have not claimed that the jury was prejudiced and it was that body which determined the punishment which these offenses warranted.

CONCLUSION

Through its rules, which have been determined to be constitutionally valid, Madison College seeks only to prohibit one conduct-oriented method of First Amendment expression in limited circumstances, that is, it prohibits demonstrations inside buildings. It allows virtually without limitation the same method of expression to be used out of doors. Madison College also allows students to avail themselves of the purer forms of First Amendment expression inside buildings.

Having already had the constitutionality of the rules determined adversely to them in an ancillary action in a forum of their choosing, Petitioners should not now be allowed to challenge the validity of those rules.

In any event, however, this case must be governed by *Adderly* v. *Florida*, which compels the conclusion that Petitioners' first claim is without merit.

Nor is there substance to Petitioners' argument that they should not be given greater penalties after a *de novo* trial before a jury which was unaware of the prior proceedings in the court not of record. *North Carolina* v. *Pearce* does not

support Petitioners' contention and the state's legitimate interest in maintaining its existing structure is clearly demonstrated by the opinion of the Supreme Court of Virginia below.

Accordingly, Respondent prays that this Court refuse to issue the writ of certiorari sought by Petitioners, for the opinion and judgment of the Supreme Court of Virginia is plainly correct and Petitioners have not set forth a claim which merits review under any of the considerations contained in Rule 19 of the Rules of the Supreme Court of the United States.

Respectfully submitted,

ANDREW P. MILLER
Attorney General

WILLIAM G. BROADDUS
D. PATRICK LACY, JR.
Assistant Attorneys General

Supreme Court Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Andrew P. Miller, Attorney General of Virginia, counsel for Respondent in the captioned matter and a member of the bar of the Supreme Court of the United States, do hereby certify that on the 18th day of May, 1972, I mailed three copies of the foregoing Brief for Respondent In Opposition to Petition for a Writ of Certiorari to John C. Lowe, counsel for petitioners, 1111 West Main Street, Charlottesville, Virginia 22903.

ANDREW P. MILLER
Counsel

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15,391

Lewis H. Sword, et al.,

Appellees,

versus

James W. Fox, et al.,

Appellants.

Appeal from the United States District Court for the Western District of Virginia at Harrisonburg. Robert R. Merhige, Jr., District Judge.

(Argued May 4, 1971 Decided July 1, 1971).

Before BRYAN, BUTZNER and RUSSELL, Circuit Judges.

William G. Broaddus, Assistant Attorney General of Virginia, (Andrew P. Miller, Attorney General of Virginia, D. Patrick Lacy, Jr., Assistant Attorney General of Virginia, and James R. Sipe on brief) for Appellants, and John C. Lowe (Robert P. Dwoskin, and Lowe, Dwoskin and Gordon on brief) for Appellees.

RUSSELL, Circuit Judge:

This is a class action, brought on behalf of all the students at Madison College, for a declaratory judgment that certain regulations governing demonstrations at such college were constitutionally invalid as overboard and vague and as impermissible restraints on freedom of speech and assembly. Madison College is a State-supported institution, located at Harrisonburg, Virginia, with a student body of approximately 4,000, mostly women.

The regulations under attack, which were adopted three years before the incidents involved here and which are included in the Student Handbook made available to all students on matriculation,[1] are concerned with student protests and demonstrations on the college campus. After setting forth a definition of demonstrations, the regulations require generally that any proposed demonstration "be registered with the Office of Student Activities 48 hours in advance." Other than this requirement of registration, the regulations impose no direct restrictions except the one specifically involved here, i.e., that "Demonstrations are forbidden in the area of the Health Center, *inside any buildings* and congregating in the locations of fire hydrants." (Italics added.) Thus, the president of the college stated without contradiction that, to his knowledge, the regulations had never been applied "to prohibit the desire of students to meet and demonstrate in areas of the campus."[2] One of the witnesses called by the plaintiffs, a student who had engaged in the "sit-ins" involved in this action, testified that, while written application to register a demonstration was required, the registrant did not set forth

[1] These regulations are set forth in the opinion of the District Court as reported in 317 F. Supp. 1055, at pp. 1067-69.

[2] App., pp. 110 and 118.

thereon the purpose of the demonstration, only the time the demonstration was to begin and the areas where it was to be held; and that except for "making a few changes in some of the areas where the demonstration was to be held," "automatic approval" of the registration followed.[3] Thus the regulations, neither by their language nor by their application, are instruments for censoring or controlling the purpose or content of a demonstration.

The situation which generates this controversy began on Thursday evening, April 23, when a group of students organized a mass meeting of students to protest the termination of the services of certain teaching personnel at the college. Such protest meeting was duly registered in conformity with the college rules. After the meeting, however, a group of students determined to move on to Wilson Hall, a combination administration and classroom building, in which the office of the college president was located, and, as a part of their protest demonstration, to remain there overnight, engaging in "a sleep-in in front of the President's office." Some had brought sleeping bags; others sat or lounged about on benches or chairs. About an hour and a half afterwards, the Dean of Student Services came to the building, advised the group that they were violating the college regulations by a demonstration in Wilson Hall and warned them of the sanctions provided in the Student

[3] App., pp. 99-100. There is some discussion in the testimony about the different rules applicable to requisitioning a building for a meeting and registering a demonstration. A building or area is apparently requisitioned for what is deemed a normal college function. Application for this purpose is made to the Provost of the College. On the other hand, demonstrations as defined in the rules are registered with the Director of Student Activities. The students seemingly recognized the difference between the two proceedings. At any rate, there was no misunderstanding in connection with the two "sit-ins" involved here. The student sought to register them as demonstrations with the Director of Student Activities. App., p. 143.

Handbook for demonstrations within a college building. Some of the students left; others remained until given a second warning about an hour later. On the next day, a group of students sought to register a "vigil" as they described it, to be held 48 hours later in Wilson Hall. The Dean of Student Services refused to register it because it would constitute "a demonstration inside a building" impermissible under the college regulations. Despite this denial, the students staged a "sit-in" on the night of April 26 in Wilson Hall. College officials came to the building on three occasions, requested the students to leave, and warned of the consequences should they fail to leave. After the first request to leave, some of the students departed but a substantial number remained. Other students joined the group in the building and a large number gathered in front of the building. There was singing and chanting, both from within the building and from the group that had gathered outside, but no violence or destruction of property. Finally, the police were called and a number of students engaged in the "sit-in" were arrested and charged with trespass under State law.[4] Disciplinary action was begun against some of the students involved in the "sit-in" and one, it seems was suspended and others were subjected to some type of dis-

[4] A number of students, including the appellees, have been prosecuted under the State trespass statute because of their involvement in these demonstrations. They have already been tried and convicted in the State Courts and their convictions are on appeal. Such appeals will turn on the validity of the very regulations challenged in this action. Whether under the recent decisions in *Younger* v. *Harris* (1971) 401 U.S. 37, and related cases, this Court should abstain in favor of the State Court and permit it to determine the vadility or invalidty of the instant regulation in the criminal action was not raised by either party and, for that reason, we do not reach the question. Cf., *LeClair* v. *O'Neil* (3-Judge Court, Mass. 1969) 307 F. Supp. 621, 624, note 4.

ciplinary action. Three days later, the appellees and others had a demonstration on the campus to protest both the punishment of the appellees and the failure to continue the employment of certain members of the faculty. This subsequent demonstration was registered without any difficulty and there was no attempt by the college authorities to censor its content or to control or limit its purposes.

By this proceeding, the plaintiffs sought a declaratory judgment that the regulations proscribing their "sit-ins" in Wilson Hall were constitutionally invalid and for an injunction prohibiting the college from imposing any punishment on account of such "sit-ins." The District Court, on motion for summary judgment, granted the relief sought. We reverse.

It should be recalled at the outset, that, according to the uncontradicted testimony[5] of the college's president, the college, acting under these regulations, had never denied any student group the right to demonstrate nor were the students involved in the "sit-ins" with which this action is concerned ever denied the right to demonstrate in protest. As has been pointed out, these students actually did demonstrate, after registration of their demonstration, as required under these regulations, both before and after the "sit-ins" in Wilson Hall.[6] Nor was any attempt made to

---

[5] On appellees' motion for a temporary injuction, the District Court heard certain testimony. This testimony was incorporated into the record on the hearing of the motion for summary judgment.

[6] This distinguishes this case from *Hammond* v. *South Carolina State College* (D.C.S.C. 1967) 272 F. Supp 947, and *Jones* v. *Board of Regents of University of Arizona* (9th Cir., 1970) 436 F.2d 618, both of which dealt with an absolute bar on a demonstration or distribution of handbills. Both these cases, however, recognized that a college or university might constitutionally impose "reasonable rules regulating the time, place, and manner of the exercise of First Amendment rights." (Page 620, 436 F.2d, 272 F. Supp. pp. 950-1).

control or even influence the purpose of their demonstrations or, so far as the record shows, any other demonstrations on campus; indeed, the form of registration required to be filed with the Director of Student Activities, did not request information with reference to the demonstration's purpose.[7] What was denied these students—and all that was denied them—was the right to demonstrate by a "sit-in" *specifically in Wilson Hall.* It is thus not the *right* to protest but the *place* of protest that was regulated and is involved in this appeal.[8] The 48-hour registration requirement under the regulations, though referred to in the briefs filed by the parties, is similarly not in issue.[9] That regulation was not invoked against the appellees;[10] in fact, it seems to have been liberally enforced. The only portion of the challenged regulations under which the appellees were threatened with disciplinary action concerned, not the right generally to demonstrate nor the requirement of

---

[7] App., pp. 99-100.

[8] In the testimony of the Director of Student Services, he described the action taken thus:

> "Q. So you disapprove this registration or demonstration?
> "A. I did not disapprove a demonstration. I disapproved the location of that particular demonstration and in fact a demonstration on the same topic by the same people was held about three days later for 36 hours outside and there was no problem. * * *" (App., p. 142)

[9] That such requirement, if applied to these demonstrations, would not have been invalid, see *Powe* v. *Miles* (2d Cir. 1968) 407 F.2d 73, 84. A similar requirement was suggested as valid in *Wolin* v. *Port of New York Authority* (2d Cir. 1968) 392 F.2d 83, 94:

> "* * * some guidelines are in order. In accommodating the interest of protesters and general public, the Port Authority may set approximate and reasonable limitations on the number of persons who may engage in such activities at any specific time, the duration of the activity and the specific places within the building where the rights of expression may be exercised."

[10] App., p. 111.

48 hours' prior registration of a demonstration, but specifically the college's denial of the right to demonstrate within a college building, a building which housed the administrative offices of the college and certain classrooms. It is only that regulation so applied, that appellees have standing to challenge. See *United States* v. *Raines* (1960) 362 U.S. 17, 21-2, 80 S.Ct. 519, 4 L. Ed. 2d 534, and *LeClair* v. *ONeil, supra* (pp. 624-5, 307 F. Supp.). To repeat, the basic question presented by the appeal is whether a State-supported college, while permitting generally and without discrimination demonstrations elsewhere on its campus, may, in consonance with the First Amendment, deny students the right to demonstrate and protest by way of a "sit-in" within a combination classroom and administrative building.[11]

Although it may be taken as settled that a college student, by his enrollment, is not stripped of his constitutional right to engage in "symbolic" speech in the form of demonstrations of protest,[12] this does not mean that the exercise

---

[11] Cf., *Cohen* v. *California*, ... U.S. ....., filed June 7, 1971, (pp. 4-5, slip opinion):

> "In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. See *Edwards* v. *South Carolina*, 372 U.S. 229, 236-237, and n.11 (1963) Cf. *Adderly* v. *Florida*, 385 U.S. 39 (1966)."

[12] *Saunders* v. *Virginia Polytechnic Institute* (4th Cir. 1969) 417 F.2d 1127, 1130; *Dixon* v. *Alabama State Board of Education* (5th Cir. 1961) 294 F.2d 150, 156-7, cert. den. 368 U.S. 930, 82 S.Ct. 368, 7 L. Ed. 2d 193; *Esteban* v. *Central Missouri State College* (8th Cir. 1969) 415 F.2d 1077, 1085; *Soglin* v. *Kauffman* (7th Cir. 1969) 418 F.2d 163, 165-6.

of such right is absolute and unlimited.[13] While a flat ban on campus demonstrations would be manifestly invalid, "It is equally clear, however, that students do not have an unlimited right to demonstrate on university property. As in the case of other public facilities, a university may place reasonable restrictions on demonstrations to protect safety and property, maintain normal operations, facilitate campus traffic and the like."[14] This accords with the general principle as expressed in *Food Employees* v. *Logan Plaza* (1968) 391 U.S. 308, 320, 88 S.Ct. 1601, 20 L. Ed. 2d 603:

> "Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State."

In line with this principle, it has been often observed that, "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time." *Cox* v. *Louisiana* (1965) 379 U.S. 536, 554, 85 S.Ct. 453, 13 L. Ed. 2d 471; *Adderley* v. *Florida* (1966) 385 U.S. 39, 87 S.Ct. 242, 17 L. Ed. 2d 149, and *Abernathy* v. *Conroy* (C.A. 4, 1970)

---

[13] *Esteban* v. *Central Missouri State College, supra,* (pp. 1086-7, 415 F.2d).

See, also, *Cox* v. *Louisiana* (1965) 379 U.S. 559, 563, in which "the Court held valid on its face a statute forbidding picketing and parading near a courthouse. This was deemed a valid regulation of conduct rather than pure speech. The conduct reached by the statute was 'subject to regulation even though (it was) intertwined with expression and association,'" *Coates* v. *Cincinnati* ..... US. ....., filed June 1, 1971 (dissenting opinion of Justice White).

[14] *Developments in the Law of Academic Freedom,* 81 Har. L. Rev. 1045, 1131 (1968).

429 F.2d 1170, 1173-4.[15] It is clear from the foregoing that a college may adopt and enforce reasonable, non-discriminatory rules governing demonstrations on its campus.

In determining whether a college regulation restricting demonstrations is reasonable, the Courts must take into consideration both "the special characteristics of the school environment,"[16] and that the regulation of student conduct is ordinarily the prerogative of the college authorities, with judicial intervention only when the circumstances are such as to "directly and sharply implicate basic constitutional values."[17] For these reasons, the "precedents about the meaning of the first amendment in other areas of life can (not) be indiscriminately transferred to the university setting." Wright, *The Constitution on the Campus,* 22 Vanderbilt Law Rev. 1027, 1038. Specifically, the test for the reasonableness of college regulations is whether such regulations "measurably contribute(s) to the maintenance

---

[15] See, also, *Groppi* v. *Frochlich*, (3-Judge Court, Wis., 1970) 311 F. Supp. 765, 770:

> "'Fair use' of the opportunity for public discussion and demmonstration may not be denied. (Citing authorities) However, it has been consistently recognized that there are places in which and times at which speeches and meetings and demonstrations may be prohibited."

[16] *Tinker* v. *Des Moines School Dist.* (1969) 393 U.S. 503, 506, 89 S.Ct. 733, 21 L. Ed. 2d 731; 55 Minn. L. Rev. 116, at pp. 127-8 (1970).

[17] *Epperson* v. *Arkansas* (1968) 393 U.S. 97, 104, 89 S.Ct. 266, 21 L. Ed. 2d 228; *Barker* v. *Hardway* (D.C.W.Va. 1968) 283 F. Supp. 228, 235, aff. 399 F.2d 638, cert. den. 394 U.S. 905, 89 S.Ct. 1009, 22 L. Ed. 2d 217; *Sill* v. *Pennsylvania State University* (D.C.Pa. 1970) 318 F. Supp. 608, 616. See, also, the cautionary statement in note, 48 N.C.L. Rev. 943, (1970):

> "But the courts have been extremely reluctant to scrutinize substantive rules that govern student behavior and more reluctant still to void such rules because of constitutional infirmity."

of order and decorum within the educational system,"[18] are calculated to prevent interference with " 'the normal activities of the University' "[19] or obstruction to its function "to impart learning and to advance the boundaries of knowledge,"[20] or are important in maintaining "order" and "normal operations."[21] In testing any college regulation for reasonableness under these criteria,[22] the Courts, it should be emphasized, are not concerned with "whether such rules are wise or expedient but merely whether they are a reasonable exercise of the power and discretion of the school authorities." *Burnside* v. *Byars, supra* (363 F.2d at p. 748).[23]

The regulation involved here, which bans demonstrations in college buildings but not otherwise, tested by the criteria just stated, is reasonable. As has been observed, it does not purport to pass on the purpose of the demonstra-

---

[18] *Burnside* v. *Byars* (5th Cir. 1966) 363 F.2d 744, 748.

[19] *Wright, supra* (at pp. 1041-2, 22 Vanderbilt Law Rev.).

[20] *Goldberg* v. *Regents of Univ. of California* (1967) 57 Cal. Reptr. 463, 472; 21 Syracuse L. Rev. 1260 (1970).

[21] 81 Har. L. Rev. 1048, 1131 (1968); cf., *Waugh* v. *Mississippi University* (1915) 237 U.S. 589, 35 S.Ct. 720, 59 L. Ed. 1131.

[22] A distinction must be made between what are designated as "ad hoc" rules (i.e., rules adopted to meet a present situation) and general rules. See *Burnside* v. *Byars, supra.* This distinction is recognized in the brief of appellees. (Page 2, Brief for Appellees).

[23] See, also, *Dickey* v. *Alabama State Board of Education* (D.C. Ala. 1967) 273 F. Supp. 613, 617-8:

> "This Court recognizes that the establishment of an educational program requires certain rules and regulations necessary for maintaining an orderly program and operating the institution in a manner conducive to learning. However, the school and school officials have always been bound by the requirement that the rules and regulations *must be reasonable.* Courts may only consider whether rules and regulations that are imposed by school authorities are a reasonable exercise of the power and discretion vested in those authorities. Regulations and rules which are necessary in maintaining order and discipline are always considered reasonable." (Italics in opinion)

tion. Nor has it been used to deny to students the right to protest on campus, provided only such protests are not carried on within a college building. Its purpose is manifest. College buildings are generally dedicated to classrooms, administrative offices, libraries, health centers, or dormitories. In all of these, order and study are expected. It can scarcely be argued that demonstrations in a classroom or administration building during day would not create a disruption in the educational activity of the institution and inconvenience its normal administrative operations.[24] At night, on the other hand, demonstrations in such buildings offer too many opportunities for vandalism, and, in some instances, lawlessness. It is for this reason that demonstrations, even in the public streets, have been prohibited in the nighttime. *Abernathy* v. *Conroy, supra* (429 F.2d at p. 1174); *Cottonreader* v. *Johnson* (D.C. Ala. 1966) 252 F. Supp. 492, 500. In dormitories, where students are entitled to the quiet necessary both for sleep and study, demonstrations, which, though not violent, are generally noisy, interfere with that decorum expected in the "normal operations" of the college. It is plain, therefore, that a regulation which prohibits demonstrations within the college buildings "measurably contribute(s) to the main-

---

[24] See, Van Alstyne, *The Judicial Trend Toward Student Acddemic Freedom*, 20 U. of Fla. L. Rev. 290, 300:

> "Indeed, the administrative inconvenience of having to accommodate ad hoc demonstrations in certain locations (for example, the president's office or inside a classroom building), may justify a rule placing some facilities entirely off limits as a political forum, even though a given demonstration might itself not happen to be disruptive."

See, also, the comment in *Regulation of Demonstrations*, 80 Har. L. Rev. 1773, 1776-7 (1967):

> "Similarly, the very presence of demonstrators in public buildings may upset normal operations."

tenance of order and decorum within the educational system" and represents "a reasonable exercise of the power and discretion" of the college authorities. *Grossner* v. *Trustees of Columbia University in City of N. Y.* (D.C.N.Y. 1968) 287 F. Supp. 535, 544-5, so held. This certainly should be the rule, when, as here, demonstrations, without any restriction of purpose, are permitted in other areas of the campus.

The appellees, as well as the District Court's opinion, assume that the reasonableness, and thus the validity, of the regulation, as applied to them, is to be determined by whether the particular demonstrations involved here were violent or peaceful and they contend that if their demonstrations were peaceful, even though violative of the regulation, the regulation would be invalid as applied to them and their demonstration. Such argument is untenable.[25] The proposed demonstration in *Abernathy* v. *Conroy, supra* (429 F.2d p. 1174), was, so far as the record indicated, to have been peaceful and this did not void the ordinance prohibiting night demonstrations. There was, as Justice Douglas pointed out in his dissent, "* * * no violence; no threat of violence; no attempted jail break; no storming of a prison; no plan or plot to do anything but protest" in *Adderly* v. *Florida, supra* (385 U.S. at p. 51), but this did not void a conviction under the state statute on trespass. The issue in this case, as has been already observed, is the reasonableness of the general regulation promulgated by the college and published in its Student Handbook. Just as the ordinance in *Abernathy* and the statute in *Adderley,* were measured for reasonableness, the reasonableness of

---

[25] In advancing this argument, appellees fail to recognize the distinction between *ad hoc* and general rules previously promulgated. See note 22.

the regulation involved here is to be resolved, not by the peculiar facts involved in these particular "sit-ins" that gave rise to this controversy—whether they were violent or not—but by the inquiry whether such regulation was reasonably connected generally with preventing interference with "the normal activities" of the institution. If the regulation was reasonable by this standard and thus within the power of the college, it is immaterial whether the appellees, in violating the regulation, were violent or peaceful. The rationale of this conclusion is well stated in *Bayless* v. *Martine* (5th Cir. 1970) 430 F.2d 873, 879:

> "When a general regulation such as that contained in Hill Hints had been made explicitly applicable to the students here involved and they had been fully apprised of the penalty to be meted out for violation of the regulation not only by the Dean's direct statements to them but by the express provisions of the Student Discipline and Conduct Code, which was printed and distributed as a part of the Hill Hints handbook, then the University's right to discipline an erring student is not contingent upon the extent of disruption caused by his direct disobedience of the regulation."

The appellees urge, though, that public buildings, such as that involved here, may not be closed to demonstrators, that any regulation so closing them would be unreasonable, and they would deny the value of *Grossner* as a precedent. In support, they cite *Edwards* v. *South Carolina* (1963) 372 U.S. 229, 83 S. Ct. 680, 9 L. Ed. 2d 697; *Brown* v. *Louisiana* (1966) 383 U.S. 131, 86 S. Ct. 719, 15 L. Ed. 2d 637, and *Wolin* v. *Port of New York Authority* (2d Cir. 1968) 392 F.2d 83, cert. den. 393 U.S. 940. None of these authorities, it seems to us, supports the position of

the appellees. *Edwards* involved the right to demonstrate on State House grounds, not in a building. *Brown* was basically an equal protection case, not a First Amendment case. The "prevailing opinion"[26] recognized that, "A State or its instrumentality may, of course, regulate the use of its libraries or other public facilities' but held that it must do so "in a reasonable and undiscriminatory manner, equally applicable to all and administered with equality to all. It may not do so as to some and not as to all. It may not provide certain facilities for whites and others for Negroes," specifically, "Negroes could not be denied access (to a public library) since white persons were welcome." (383 U.S. at pp. 139 and 143) It was the failure of equal and nondiscriminatory treatment that invalidated the State action in that case. Moreover, some of those Justices who concurred in the result reached in the "prevailing opinion" did so on the ground that an essential element of the crime in the statute was intent to provoke a breach of the peace and that there was a complete absence of evidence of any such intent. (383 U.S. at pp. 161-2) In *Wolin* the issue concerned the right to distribute handbills in a building which really was used, in part, as a passageway or street for the commuting public of New York City. To a substantial extent, the building was similar to a public street through which daily hundreds of thousands of commuters passed.[27] Even here, where the structure might well be deemed, in part at least, a quasi-street, the Court recognized

---

[26] There were a number of opinions in this case. The opinion of Justice Fortas was described as the "prevailing opinion" in Justice Black's dissent. (383 U.S. at p. 152, n. 1) It is of some significance that the minority in *Brown* became the majority in *Adderley*.

[27] Cf. *Massachusetts Welfare Rights Organization* v. *Ott* (1st Cir. 1969) 421 F.2d 525, 527, n. 4:

"A welfare office is not to be equated with a public street."

the right of the public authority, by proper regulation, to proscribe demonstrations or distribution of handbills in certain areas of the building, presumably the areas not used as a public passageway.

In summary, in our opinion, the regulation proscribing the use of college buildings for demonstrations, especially as applied to the particular building involved here, is a valid and reasonable exercise of the authority of the college to promulgate and enforce rules and regulations and does not represent an unreasonable limitation upon the First Amendment rights of the appellees and the class they represent.

In addition to assailing the regulation as invalid under the First Amendment, the appellees argue, and the District Court found, that the regulation was violative of due process because of vagueness and overbreadth. This claim focuses upon the specificity required in college rules and regulations. As the District Court remarked, there is a sharp divergence in the cases on this question[28] but all seem to agree that the same specificity is not required in college rules as is necessary in criminal statutes. *Jones* v. *Snead* (8th Cir. 1970) 431 F.2d 1115, 1117, *Banks* v. *Board of Public Instruction of Dade County* (3-Judge Court, Fla., 1970) 314 F. Supp. 285, 290. The general rule on vagueness, as it has been developed in connection with the construction of criminal statutes, is that all that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo* (1947) 332 U.S. 1, 8, 67 S. Ct. 1538, 91 L. Ed. 1877. Even measured by this

---

[28] Cf. *Whitfield* v. *Simpson* (3-Judge Court Ill., 1970) 312 F. Supp. 889, 896, and *Soglin* v. *Kauffman* (7th Cir. 1969) 418 F.2d 163, 168, on sufficiency of the term "misconduct" in a college regulation.

standard, the regulation, in its definition of "demonstration," is sufficiently definite. Actually, "demonstration" itself is a fairly definitive descriptive term. It had no added descriptive words in the ordinance involved in *Shuttlesworth* v. *Birmingham* (1969) 394 U.S. 147, 89 S. Ct. 935, 22 L. Ed. 2d 162, and, while the point was not adverted to in that decision, it seems unlikely the vulnerability of the term to a charge of vagueness, if valid, would have passed unchallenged in that case. The appellees here apparently did not find the terms confusing or unclear. They sought to register their "vigil" or "sit-in"—whatever its proper description—as a demonstration under the college regulation. The language was "sufficiently definite" that they knew their planned activity came within the regulation's definition of "demonstration" and required registration. There can be no question that the appellees intended "a public manifestation of * * * protest * * * by a mass * * * occupation of premises." And, in their brief, the appellees concede that the definition of "demonstration" is "based on terms which are susceptible to common understanding." Despite this concession, the appellees press the point that the definition, taken in the context of all the related rules, becomes vague because it is "used in a strictly negative sense" and "for purposes either of limiting it or completely prohibiting such activity." The premise on which this argument rests is, in our judgment, unsound and contrary to the facts in this case. The regulations, as has already been emphasized, do not, and have not been applied, to prohibit all demonstrations on campus; they only ban those in college buildings. And, as so limited, we have held they are reasonable.

The District Court, also, though the definition of "demonstration" in the regulation is defective, too, because it exempted "social and athletic activities" from its definition.

It occurs to us that the exemption was unnecessary. "Demonstration" connotes, in the context of this regulation, a public manifestation primarily of protest or condemnation. "Social and athletic activities" do not fit into this connotation, and, even though not expressly exempted, could be construed as outside the definition of the bare term "demonstration." Further, the exemption, even if required, is warranted. It is to be assumed that all "social and athletic activities" have their own special regulations and are carried out under college supervision. Such is not true of demonstrations of the character covered by these regulations.

Finally, the District Court found the regulations overbroad. Applied to the specific building where the "sit-in" involved here took place, it is clear the regulation is not overbroad, whether applied during the day or night. For the reasons already given, we regard the application of the regulation as reasonable and within the proper authority of the college.

The decision of the District Court is accordingly reversed and the action is remanded with instruction to dismiss the complaint.

REVERSED AND REMANDED.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
JUN 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1337

EDWARD DEVINE JOHNSON, *et al.*,

Petitioners,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

REPLY BRIEF FOR PETITIONERS

JOHN C. LOWE
American Civil Liberties
Union of Virginia
1111 West Main Street
Charlottesville, Virginia 22903

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010

Attorneys for Petitioners

F. GUTHRIE GORDON, III
LOWE & GORDON
1111 West Main Street
Charlottesville, Virginia 22903
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1337

EDWARD DEVINE JOHNSON, *et al.*,

Petitioners,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

REPLY BRIEF FOR PETITIONERS

The petition for certiorari raises two issues: (1) the validity, under the First Amendment, of state criminal trespass convictions and (2) the constitutionality of a system whereby a defendant who appeals his conviction from a state non-record court may receive a harsher sentence following a trial *de novo* in a court of record. For the most part the brief in opposition simply joins those two issues and requires no response.

However, the respondent has raised one claim which requires rebuttal.

In its brief in opposition it claims, at page 18, that petitioners have raised an issue in this Court not properly presented below. The issue in question is the petitioner's claim of "clear punitive intent by the judge and prosecutor" in forcing a jury trial on petitioners and in characterizing the underlying offense as a very serious one. Pet. for Certiorari, p. 11.

The respondent is factually in error. Not only at the *de novo* trial in the Circuit Court of Rockingham County (TT. 1-2, 123-38) but in their Petition for Writ of Error to the Supreme Court of Virginia (at pp. 19-20) and in their Appellant's Brief (at pp. 28-29) the petitioners raised their objection to a jury's being forced upon them when only questions of law were at issue. At all relevant court levels petitioners continually objected to being tried by a jury. The implication that a "clear punitive intent" was involved in refusing to allow this waiver is a fair inference drawn directly from the material facts in the record. Objection was timely made and preserved, and it cannot be said that the question is raised here for the first time.

In any event, there is no dispute that the primary issue —the validity of higher sentences on appeal to a trial *de novo*—has clearly been raised. The added factor represented by the contention of punitive intent merely underscores the validity of the Fourth Circuit rule and the need for this Court to grant certiorari.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

JOHN C. LOWE
American Civil Liberties
Union of Virginia
1111 West Main Street
Charlottesville, Virginia 22903

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
156 Fifth Avenue
New York, New York 10010

Attorneys for Petitioners

F. GUTHRIE GORDON, III
LOWE & GORDON
1111 West Main Street
Charlottesville, Virginia 22903
Of Counsel